No. 10992

# IN THE
# UNITED STATES
# CIRCUIT COURT OF APPEALS
## FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association, and LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,
*Appellants,*

vs.

WM. A. MARSHALL, Deputy Commissioner of the United States Employees' Compensation Commission for the Fourteenth District, and TEX HADDON,
*Appellees.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

## BRIEF OF APPELLANTS

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### PRELIMINARY STATEMENT

This is an appeal from the final decree of the District Court granting Appellees' motion for dismissal of Appellants' Bill of Complaint for Mandatory Injunction, which was filed to set aside the compensation order and award of compensation made by Wm. A. Marshall, Deputy Commissioner of the United States Employees' Compensation Commission for the 14th Compensation District, respecting the claim of Tex Haddon involved herein.

## JURISDICTION

**District Court**

The jurisdiction of the District Court is believed to be sustained by Subdivision (b) of Section 21 of the Longshoremen's and Harborworkers' Compensation Act (Public Law No. 803—69th Congress) as amended (33 U.S.C.A. Sec. 921(b)) which reads in part as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, etc."

and under Subsection (b) of Section 3 of the Defense Base Act (Public Law No. 208—77th Congress) (42 U.S.C.A. Sec. 1653(b)), reading in part as follows:

> "Judicial proceedings provided under Sections 18 and 21 of the Longshoremen's and Harborworkers' Compensation Act in respect to a compensation order made pursuant to this act shall be instituted in the United States District Court of the judicial district wherein is located the office of the Deputy Commissioner whose compensation order is involved if this office is located in a judicial district," etc.

**Circuit Court**

The jurisdiction of this court is believed to be sustained by Judicial Code Sec. 128(a) (28 U.S.C.A. Sec. 225(a)), reading in part as follows:

> "The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions—

"First. In the District Courts in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

The decree appealed from was entered on October 16, 1944 (Tr. 123). Within three months thereafter, pursuant to Sec. 240-8(c) of the Judicial Code (28 U.S.C.A. Sec. 230), to-wit, on January 13, 1945, Notice of Appeal was served and filed in accordance with Rule 73(a) and (b) of the Rules of Civil Procedure (Tr. 125). Cost Bond on appeal in the sum of $250.00 was filed with the Notice of Appeal on January 13, 1945, pursuant to Rule 73(c) of the Rules of Civil Procedure (Tr. 126). Stipulation designating the record, proceedings and evidence to be contained in the record on appeal was signed on February 16, 1945, and filed with the Clerk of the District Court on February 17, 1945, pursuant to Rule 75(f) of the Rules of Civil Procedure (Tr. 129). Statement of points on which Appellants intend to rely on appeal was served and filed on January 26, 1945, pursuant to Rule 75(d) of the Rules of Civil Procedure (Tr. 132). Order pursuant to stipulation, extending the time for filing the record on appeal and docketing the action to March 10, 1945, was entered by the District Court on February 21, 1945, pursuant to Rule 73(g) of the Rules of Civil Procedure (Tr. 133, 134). Appellants' statement of points on which they intend to rely on appeal and designation of the record deemed necessary for the consideration thereof was served on February 23, 1945, and filed with the Clerk of the Circuit Court on March 3, 1945, pursuant

to Subdivision 6, Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit (Tr. 139).

## STATEMENT OF THE CASE

The question involved is whether there is any *substantial evidence* in the record to support the award of compensation entered by the Deputy Commissioner, based upon the finding that claimant's disability was the result of an accident that occurred in June, 1942.

The following is a brief summary of the evidence:

On January 22 or 23, 1942, claimant, Tex Haddon, commenced working as a plumber in the Hawaiian Islands (Tr. 33). During the last part of May or the first part of June, 1942, claimant testified that while engaged with two other employees in attempting to stand up a long section of heavy pipe, he slipped and felt something snap lown down in his back; that when this happened everything turned black for a second and he felt sick and "pretty hot" (Tr. 34). After sitting down a moment, he said he reported the accident to Andrew Lukehardt, the plumbing foreman (Tr. 35). This, however, was denied by Mr. Lukehardt (Tr. 98). Claimant decided, however, to wait a day or two before having an X-ray taken, as he did not want to lose any time from his work. About thirty minutes after the alleged accident, he resumed working on the prefabricating bench (Tr. 35), in which no heavy lifting was involved. (The plumbing foreman, however, testified there was no change in his type of work, Tr. 99). Previous to this alleged occurrence, his general health was good, and his back

and legs had never bothered him. Afterwards, he would wake up with a sore back and suffer cramps in his legs (Tr. 37). His back would also get sore if he was on his feet too long. This condition persisted from that day on (Tr. 38). He continued to work, however, until December 17, 1942 (Tr. 16) when he left for the United States (Tr. 38). He lost no time from his work on account of any alleged disability (Tr. 99) and both his work record and his attendance record were exemplary (Tr. 101).

W. A. McFayden, a roommate of claimant, testified that claimant had always seemed "peppy and full of life" and was a hard worker until along the latter part of June, when he started to complain about his back and legs (Tr. 59). After that, he said claimant laid in his bunk in the evening, never leaving the camp (Tr. 60), and that he didn't seem to have the pep that he had before (Tr. 62).

After finishing his employment contract, claimant returned to the United States on December 28, 1942 (Tr. 43, 103). Upon arrival, he was, according to the customary practice of the employer, handed a claim statement by a company representative, with instructions to fill it out completely if he had any claim of any nature (Tr. 104). This he signed without asserting any claim therein (Tr. 104, 106). The next day, he signed another statement, claiming underpayment in the amount of $39.50, but again asserting no claim on account of the alleged injury (Tr. 104, 107).

From San Francisco, he proceeded to his home in

Lewiston, Idaho, arriving there on February 9, 1943, after making several stops in Spokane, Auburn, Kent and Seattle (Tr. 50). There, he contracted a cold and a severe pain settled in his back (Tr. 42, 43). As a result, he consulted Dr. E. L. White, who had X-rays taken of his back on March 8, 1943. Dr. White told him he thought his "fifth lumbar" was damaged (Tr. 51) but did not tell him that his condition was due to the alleged injury (Tr. 56). Dr. White merely told him that there was nothing he could do, and referred him to claimant's employer. The employer, in turn, referred the matter for investigation to the Nichols Adjustment Bureau, at Boise, Idaho (Tr. 52).

The Nichols Adjustment Bureau, in turn, arranged an examination of claimant in Boise by doctors there (Tr. 26) and later by doctors in San Francisco, after claimant expressed a willingness to go there for further examination (Tr. 30).

Claimant was placed under observation at Franklin Hospital in San Francisco on December 15, 1943, and examined there by Drs. O. W. Jones, Jr., a neurologist, and Fred C. Linde, an orthopedist. Dr. Jones found no positive objective neurological findings, and stated that, from a neurological standpoint, the patient had no disability (Tr. 72). Dr. Linde also reached the same conclusion from an orthopedic point of view (Tr. 76).

A short time before the San Francisco trip, to-wit, on August 28, 1943, claimant for the first time signed a claim for disability (Tr. 19), which was first filed in the Pacific District of the United States

Employees' Compensation Commission in September, 1943, and, in turn, received by Wm. A. Marshall, as Deputy Commissioner of the Fourteenth Compensation District on September 13, 1943 (Tr. 18).

The Deputy Commissioner held two hearings in this matter. One on December 29, 1943 (Tr. 13) and the second on February 8, 1944 (Tr. 21). Further examination of claimant was made by Dr. H. J. Wyckoff on February 9, 1944, at the request of claimant, and in his report, Dr. Wyckoff states that X-rays of the lumbosacral spine showed no pathology in the lateral view, except a slight narrowing of the intervertebral space between the fourth and fifth lumbar vertebrae, but that there seemed to be a very slight lipping of the fifth lumbar vertebra. He concluded that the clinical findings and history in this case were typical of a displaced intervertebral disc between the fith lumbar vertebra and the sacrum on the left side, and that "I think it is possible that the lesion which he has at the present time occurred at the time of his accident, of June, 1942." He thereupon recommended an exploratory operation of the region between the lumbar vertebrae and the sacrum on the left side (Tr. 112).

On June 5, 1944, the Deputy Commissioner entered his compensation order and award of compensation in favor of claimant, based upon a finding that claimant was wholly disabled after December 17, 1942, as the result of the injury sustained in June, 1942 (Tr. 79).

The employer and insurance carrier, feeling aggrieved by said order, filed complaint for mandatory

injunction on July 5, 1944 (Tr. 2). In due course, Appellees filed a motion to dismiss (Tr. 116), and the matter came on for hearing before the District Court, terminating in the entry of an order on October 16, 1944, granting the said motion (Tr. 123). This appeal followed.

## SPECIFICATION OF ERRORS

1. There is no substantial evidence in the record to support the finding of the Deputy Commissioner that the claimant's disability was the result of the accident complained of, and that such disability continued at the time of the hearing held on February 8, 1944.

2. The Deputy Commissioner, in making the finding as above, ignored proper medical evidence submitted therein.

3. The finding of the Deputy Commissioner as above is a mere assumption, based upon possibility and conjecture instead of substantial proof, and is therefore not in accordance with law.

4. The United States District Court for the Western District of Washington, Northern Division, erred in entering its order granting Appellees' motion to dismiss, and in refusing to anull, reverse, vacate and set aside by mandatory injunction or otherwise, the said compensation order and award of compensation made by Deputy Commissioner on June 5, 1944.

## ARGUMENT

Inasmuch as the various specifications of error are so inter-related that the argument upon one necessarily involves a discussion on each of the others, and in order, therefore, that this brief will not be unduly encumbered with repetitious arguments, Appellants will treat all the assigned errors in one argument, a brief summary of which is as follows:

1. Announcement of general legal principles.
2. The record fails to disclose that an "injury" was sustained.
3. The findings are not supported by any medical testimony.
4. The "other evidence" is insufficient to support a finding of causal relationship.
5. A review of the Federal cases re right of Deputy Commissioner to disregard medical testimony.
6. The necessity of medical testimony to establish causal relationship.

### I.

### Announcement of General Legal Principles

Appellants frankly concede at the outset the following well established principles of compensation law relied upon by Appellees in their argument below:

1. That the Longshoremen's Act is to be liberally construed in favor of the injured employee or his dependent family.
2. That findings of fact of the Deputy Commissioner, *if supported by substantial evidence*, are final and not subject to judicial review.
3. Logical deductions and inferences drawn by the Deputy Commissioner from the evidence are to be

taken as established facts, and are not judicially reviewable.

4. The court cannot weigh the evidence.

Equally well established, however, are the following legal principles upon which Appellants rely:

1. In order for the findings to be "in accordance with law," they must be "supported by evidence" (*Crowell v. Benson*, 285 U. S. 22, 46, 76 L. ed. 598, 610), which means supported by "substantial evidence." *Steamship Terminal Operating Corp. v. Schwartz*, 140 F.(2d) 7, 8 (2d Cir. 1944); *Consolidated Edison Co. v. National Labor Rel. Bd.*, 305 U. S. 197, 229, 83 L. ed. 126, 140; *National Labor Rel. Bd. v. Columbian E. & S. Co.*, 306 U. S. 292, 299, 83 L. ed. 660, 665.

2. "Substantial evidence" is more than a mere scintilla, and must do more than create a suspicion of the facts to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co. v. National Labor Rel. Bd.*, 305 U. S. 197, 229, 83 L. ed. 126, 140; *National Labor Rel. Bd. v. Columbian E. & S. Co.*, 306 U. S. 292, 299, 83 L. ed. 660, 665.

3. While the courts liberally construe the act, the causal connection between the work of the employee and the injury in the course of employment must be proven.

> "Despite its liberality, the act does not allow compensation unless the injury flows from the employment as effect from cause."
>
> *Trudenich v. Marshall*, 34 F. Supp. 486, 488 (D.C. Wash. 1940).

4. The mere fact that an injury is contemporaneous or co-incident with the employment is not a sufficient basis for an award. *Ayers v. Hoage*, 63 F.(2d) 364, 365 (C.C.A.—D.C. 1933).

5. Before he can make a valid award, the trier must determine that there is a direct causal connection between the injury, whether it be the result of accident or disease, and the employment. *Ayers v. Hoage*, 63 F.(2d) 364, 365 (C.C.A.—D.C. 1933); *Trudenich v. Marshall*, 34 F. Supp. 486 (D.C. Wash. 1940); *Hoage v. Liberty Mut. Ins. Co.*, 78 F.(2d) 874 (C.C.A.—D.C. 1935).

6. If the deputy ignores proper evidence presented, it is an error of law; and if prejudice results, his order is not in accordance with law, and the court will give relief. *Grant v. Marshall*, 56 F.(2d) 654 (D.C. Wash. 1931).

7. The statutory presumption that the claim comes within the provisions of the law merely furnishes a basis for proof and not a substitute therefor. It does not shift the burden of proof from the claimant to prove by substantial evidence that the injury arose out of and in the course of his employment. *Indemnity Ins. Co. of No. America v. Hoage*, 58 F.(2d) 1074 (C.C.A.—D.C. 1932).

With these legal principles in mind, let us now look at the record to see if there is any substantial evidence which supports the award allowing compensation.

## II.

### The Record Fails to Disclose that an "injury" was sustained

First of all, it is significant to note as bearing upon the question whether claimant ever sustained an injury in May or June, 1942, that he testified at the first hearing held on December 29, 1943, as follows:

> Question: "When did you report your case to anybody representing the employer as being a disability resulting from an injury?"
>
> Answer: "Well, no one officially. I talked it over with many of my friends over there that worked with me, but really I did not think up until the time I got the cold and it settled in there and simply got me down that I was actually injured." (Tr. 16)

At the hearing held on February 8, 1944, claimant testified in answer to the question why he did not apply for medical treatment or examination after the alleged accident occurred:

> "Because this back injury just gradually come on, and I thought it was on account of the absence of minerals or vitamins or my discomfortable bed that was causing a lot of my ill feelings.
>
> * * *
>
> "I figured that — they claim there is no minerals on the Islands at all, you see, and I thought probably it was due to the absence of minerals and I even got the idea it might be my kidneys, so I took some Doan's kidney pills and I rubbed my back with rubbing alcohol and my legs; and I took vitamin tablets. I kept thinking—I couldn't get it through my head that I could actually be hurt. That is the truth of it. I couldn't think

anything like that could render me unfit as it actually did." (Tr. 41, 42)

Secondly, it is significant that the employer's records are devoid of any report of an accident or of any injury sustained by claimant. Thus, Cedric L. Brash, manager of the Legal Department of the employer at Oakland, California, testified as follows:

> "I have examined the file thoroughly, particularly on several occasions recently in preparation for the answering of these interrogatories, and I certify that there is nothing in our personal files indicating or suggesting a complaint or report on the part of Tex. M. Haddon that he sustained any injury, traumatic or otherwise, or industrial ailment while in our employ." (Tr. 103, 104)

Likewise, S. L. Platt, who was the personnel director for the employer from December, 1941, until January 31, 1944, testified that from a perusal of the employee's employment records, he failed to find any report of any accident or injury sustained by claimant during his employment, and that both his work record and his attendance record were exemplary (Tr. 101). Certainly, such a record could not have been established by an "injured" employee to the extent that claimant contends.

Another circumstance tending to show that no specific injury occurred is the failure of claimant to assert any injury in his two statements which were furnished him upon his arrival on the mainland (Tr. 106, 107). While they are both obviously misdated, since it is admitted that claimant did not arrive on

the mainland until December 28, 1942, it appears therefrom that no claim was made in writing on either of the two occasions presented to Mr. Haddon, that he sustained any physical injury during his year's employment. It will be noted that in both statements he gave as his reason for returning to the mainland, that he had finished his contract—*not that he was physically unable to work any longer.*

## III.

### The Findings Are Not Supported by Any Medical Testimony

The medical reports filed herein are likewise devoid of any evidence upon which a finding of disability can be sustained. Thus, Dr. Linde, an orthopedist, and Dr. Jones, a neuro-surgeon, who made a thorough examination of claimant in San Francisco in September, 1943, each concluded that claimant was not suffering from any disability. Dr. Wyckoff, who made a special orthopedic examination of February 9, 1944, was unable to find any objective symptom except a slight narrowing of the intervertebral space between the fourth and fifth lumbar vertebrae, and a slight lipping of the fifth lumbar vertebrae. He found some pathology in the region of the right shoulder, which he concluded was in the nature of an arthritis involving this shoulder joint, having no causal relationship with the alleged injury. The only shred of medical testimony which favors claimant is Dr. Wyckoff's statement that "I think it is possible that the lesion which he has at the present time, occurred at the time of his accident of

June, 1942." Such testimony amounts to nothing more than speculation and conjecture, which the courts have uniformly and repeatedly held is not sufficient upon which to sustain a finding of casual relationship.

The numerous cases so holding are collated in an annotation in 135 A.L.R., beginning at page 517, where the author summarizes the rule in the following language:

> "It appears to be well settled that medical testimony as to the possibility of a causal relation between a given accident or injury and the subsequent death or impaired physical or mental condition of the person injured is not sufficient, standing alone, to establish such relation. By testimony as to possibility is meant testimony in which the witness asserts that the accident or injury 'might have,' 'may have,' or 'could have' caused or 'possibly did' cause the subsequent physical condition or death or that a given physical condition (or death) 'might have,' 'may have,' or 'could have' resulted or 'possibly did' result from a previous accident or injury — testimony, that is, which is confined to words indicating the possibility or chance of the existence of the causal relation in question, and does not include words indicating the probability or likelihood of its existence, see, as supporting the foregoing proposition the following decisions."

Among the numerous cases cited in support of the foregoing proposition is the case of *Frank Marra Co. v. Norton*, 56 F.(2d) 246 (D.C. Penn. 1931), where the court said, at page 247:

> "It is true that when 'expert testimony is re-

> lied on to show the connection between an alleged cause and a certain result, it is not enough for the doctors to say simply that the ailment in question might have resulted from the assigned cause, or that the one could have brought about the other; they must go further and testify at least that, taking into consideration all the attending data, it is their professional opinion the result in question most probably came from the cause alleged."

It is true the court in that case held that there was "other evidence" to sustain the finding of the Deputy Commissioner, but the decision at least recognizes that the medical testimony as to "possibility" was not sufficient upon which to predicate a finding of causal relationship.

Likewise, in *Burton v. Holden & M. Lbr. Co.*, 20 A.(2d) 99, 135 A.L.R. 512 (Vt. 1941), to which the foregoing annotation is appended, the court held that a doctor's opinion that the infection *could have been a possible* contributing cause of cerebral thrombosis and subsequent death, was insufficient as a basis upon which to predicate causal relationship, since the conclusion of the doctor was entirely speculative.

That this statement of Dr. Wyckoff is pure conjecture and speculation is apparent on its face, when it is remembered that he did not examine claimant until approximately twenty months after the time the claimant alleges that he was injured. Certainly, Dr. Wyckoff was in no position to give any direct testimony that the slight narrowing of the intervertebral space between the fourth and fifth lumbar ver-

tebrae and the slight lipping of the fifth lumbar vertebra was received on the occasion in question.

A recent decision of the Circuit Court of Appeals, 5th Circuit, in *Standard Acc. Ins. Co. v. Nicholas*, 146 F.(2d) 376, decided December 30, 1944, emphasizes this point. The question in that case was whether or not the paralyzed condition of the claimant was attributable to an injury received in the course of his employment, or to the disease poliomyelitis, as the same related to compensability or its lack under the Texas Workmen's Compensation Act.

The injury sustained by the claimant in that case is very similar to the one involved in the case at bar. There, the claimant testified that while he was assisting in loading rafters on a truck, one of the rafters careened him over to one side as he was holding it over his head, hurting him between the shoulders. As in the instant case, it will be noted that he was not struck by the rafter nor anything else, nor did he receive any kind of a blow. After ten or fifteen minutes he went back to work, finishing out the rest of the day, slept well that night, worked all of the next day, sleeping well that night, and was up and around town the second day after the accident, which was Sunday. He did not sleep well, however, that night, nor did he return to work Monday, but around ten o'clock Monday morning was stricken with a paralysis. He testified that he had a pain between his shoulders during the entire time, however.

The insurance carrier contended that plaintiff's injury was caused by poliomyelitis, and not by an

injury occurring in the course of plaintiff's employment. Plaintiff's two experts, while conceding that plaintiff's symptoms in some degree were always present in poliomyelitis, attributed his condition to paralysis caused by a traumatic, compressed fracture of certain vertebrae, and partial rupture and hemorrhage of the spinal cord.

The lower court overruled the defendant's motion for a directed verdict and findings of the jury were for the plaintiff.

The court, in holding that upon the basis of this evidence, the lower court should have sustained the motion of the defendant for a directed verdict, pointed out that since there was no direct evidence in the record that the fracture was received on the occasion in question, the testimony of plaintiff's experts, who did not examine plaintiff until some eleven months after the injury, was without "probative force." Said the court, at page 378:

> "There is no proof, but only an assumption or hypothesis by the medical expert of the appellee, that the appellee received fractured vertebrae and puncture of the spinal cord on the occasion in question, and under the decisions of the Texas court he cannot use a mere hypothesis as the basis of another hypothesis.
>
> "It was approximately 11 months after the time the plaintiff was unloading the rafters before either of plaintiff's physicians saw or examined plaintiff, and neither of them could have given any direct testimony that the alleged fracture was received on the occasion in question.
>
> "At best, the evidence as to any fracture of

the vertebrae, or any puncture of the plaintiff's spinal column, or that the plaintiff's condition was the result of the hypothetical fracture and puncture, is entirely circumstantial, and does not meet the test prescribed by this court * * *."

## IV.

### The "Other Evidence" Is Insufficient to Support a Finding of Causal Relationship

It follows from the foregoing authorities that the medical testimony, at least, does not lend support to the Deputy Commissioner's finding. There is left, then, only the testimony of claimant himself as to his subjective symptoms and of W. A. McFadyen as to claimant's chronic complaints and his observation of claimant's actions. It should be remembered that McFadyen was not present at the time of the alleged occurrence, and was therefore in no position to give any testimony as to causal relationship. As for the claimant himself, he admitted that he did not think that he had been hurt, but thought his condition was due to the lack of minerals in the drinking water. He completed his entire contract of employment, working approximately 7 months after the alleged occurrence took place, and arrived on the Mainland in December, 1942, without asserting any claim based on his physical condition, although he had ample opportunity to do so. It was not until he contracted the cold after returning to the mainland, which settled in his back, that he concluded that his condition must have been due to an accident that he had sustained some 8 or 9 months previous thereto. For the Deputy Commissioner to make a

finding of causal relationship upon such evidence, wholly unsupported by medical testimony, is, or clearly should be held, not to be "in accordance with law."

## V.

### A Review of the Federal Cases re. Right of Deputy Commissioner to Disregard Medical Testimony

The court below, in expressing its oral opinion, said that in a case like this one, the Deputy Commissioner was entitled to ignore the medical evidence against the award and base it solely on this other non-medical evidence. This theory was first announced in certain District Court cases which had to do with questions involving merely the percentage of disability. Thus, the first case announcing this doctrine is *Joyce v. United States Deputy Commissioner*, 33 F. (2d) 218 (D.C. Me. 1929). That this decision is clearly not applicable to the instant case can be seen readily from the following portion of the court's opinion:

> "It is claimed that here that situation exists because as alleged, there was no evidence to support the order of the Deputy Commissioner; but that can hardly be said to be the case where the injured man and his *maimed hand* were examined by the Deputy Commissioner, who evidently considered that the testimony of two doctors, called by the plaintiff, as to the percentage of disability due to the loss of parts of two fingers, should be modified by the facts observed by him supplemented by the application of the rigid rules of compensation specified in the Act and covering every particular finger." (Our italics)

The next decision in point of time on this proposition is *Jarka Corporation v. Norton*, 56 F.(2d) 287 (D.C. Pa. 1930). There claimant was injured by being struck on the back by a falling object, resulting in the fracturing of a bone in the spinal column. He was unable to return to work until more than three months thereafter, at which time he worked one day, and was then compelled to lay off for another two months. From then on until the middle of the fourth month thereafter, he worked with a fair degree of regularity, but was unable to do certain kinds of work and suffered considerable pain. At that time, he gave up entirely. The doctor called by the Deputy Commissioner stated that the pain experienced by the claimant could be due to the fracture. The court merely said:

> "I am unwilling to hold that a claimant, in order to establish a case for compensation, must produce expert medical testimony to substantiate his claim, *where it is proved that he sustained a fracture of the back and is now unable to work*, and where the disability not having existed before the injury, has been more or less continuous since the injury." (Italics ours)

In that case, therefore, it will be seen that the injury was of a traumatic nature, produced by a falling object. Furthermore, there was proof that the back had been actually fractured as a result of the accident. There was a period of three monthe immediately following the accident when the injured party was wholly unable to work. None of these elements are present in the case at bar.

The next case in point of time, and the first one from our local District Court, is *Zurich General Acc. & Ins. Co. v. Marshall*, 42 F.(2d) 1010 (D. C. Wash. 1930). There, as in the preceding case, claimant suffered a traumatic injury as the result of a falling object. Doctors testified that the claimant was totally incapacitated from following the duties of a longshoreman or any like occupation where heavy lifting was required, and that the disability of his right arm was perhaps fifty per cent to sixty-five per cent. In that case, it will be seen that there was actual proof of a fracture and the medical testimony clearly supported the Commissioner's findings.

The fourth case in point of time is *Booth v. Monahan*, 56 F.(2d) 168 (D. C. Me. 1930). This also was a percentage disability case. The court merely held that a Deputy Commissioner had the right to disregard the percentage figures given by any one of the doctors and to use his own judgment as to the amount of impairment of the claimant's leg considered with reference to his occupation.

The fifth case is *Baltimore & Ohio R. Co. v. Clark*, 56 F.(2d) 212 (D. C. Md. 1932). There the employee died two days after an attack of heat prostration. The testimony of a number of doctors was heard. One of them actually testified to causal connection. Hence, as observed by the court itself, the Deputy Commissioner's conclusion was not "devoid of support by the medical testimony." Furthermore, the court said:

"In the present case, the admitted condition

> surrounding the work in which the deceased was engaged on the first day, in contrast with those on the second day, the time and character of his first illness and of its recurrence, are alone sufficient to make reasonable the inference that the deceased was prostrated while working in the bunkers on the first day, and that this prostration or its effects recurred, due to exertion on the following day."

The sixth case is *Liberty Stevedoring Co., Inc. v. Cardillo*, 18 F. Supp. 729 (D.C. N. Y. 1937). A traumatic injury to the foot was involved there. The claimant had been hospitalized for almost one year. Thereafter, he had received medical treatment at the hospital clinic for about one and a half years. After being readmitted to the hospital, an amputation of his leg was performed. Claimant had already received considerable amounts as compensation for his disability. The testimony of two doctors supported the finding, and one doctor disagreed. The court merely said:

> "The Deputy Commissioner was not found to accept the opinion of Dr. Bartley (objecting doctor), but had the right to rely upon his own observation and other evidence."

Another case announcing that doctrine is *Southern S.S. Co. v. Norton*, 41 F. Supp. 108 (D.C. Penn. 1941). There, the employee was struck on the face over his eye by a cargo net. He testified that his vision was impaired after the accident, although it had not been impaired prior thereto. One of the doctors who examined him at the instance of the Deputy Commissioner, reported that there was a partially

dislocated lens in his eye which, with other conditions present, was sufficient to account for the diminution in vision. Another impartial physician rendered his report, in which it was stated that there was a dislocated lens in the left eye, and that "this man's condition may be due to the accident or it may have existed prior to this injury." Several doctors, testifying for the employer, stated that, while there was some physical injury to the eye, due to the accident, the latter caused no impairment of sight.

On the basis of this evidence, the court held that there was sufficient competent evidence to support a finding by the Commissioner to the effect that the diminution in vision did result from the accident.

In the first place, it will be noted that there was involved a traumatic injury, the objective symptoms of which were seen by all of the doctors. They all agreed that injury was present, the only dispute being whether such physical injury caused impairment of sight. Secondly, this was a case where a layman in ordinary affairs of life, could infer cause from effect, for obviously if the testimony of the employee was believed that his left eye and vision was normal prior to the accident, but that he could not see as well after the accident, and doctors corroborated the presence of actual physical injury to the eye, medical testimony positively establishing a causal relation was obviously unnecessary. In the case at bar, however, there is no traumatic injury involved. No doctor ever examined the claimant until many months thereafter, and therefore could give no direct testi-

mony as to the objective results of the alleged accident. Furthermore, the disability did not manifest itself until practically eight or nine months thereafter, except for leg cramps and backaches which the claimant attributed to his kidneys and the lack of vitamins in the drinking water.

Another case that may be cited in support of the doctrine is *Ryan Stevedoring Co. v. Norton*, 50 F. Supp. 221 (D. C. Penn. 1943). The opinion does not disclose the nature of the injury or the disability involved. However, it appears that claimant was injured in April, 1939, and was disabled intermittently to August 4, 1940, and received compensation for this disability. In August, 1941, he filed a claim for recurrent disability, and an additional award was made for a period of about four weeks. Thereafter, there was a further recurrence, and compensation was voluntarily paid to February 12, 1942. Later, another order was entered allowing compensation for a period terminating April 2, 1942. On August 28, 1942, another award allowed compensation to the claimant for a three-week period beginning August 6. Thus, it will be seen that the physical disability of claimant had been adjudicated on numerous occasions, and is so utterly unlike the present case on its facts, that it merits little or no consideration.

## VI.

### The Necessity of Medical Testimony to Establish Causal Relationship

On the contrary, the rule is firmly established in the state courts, that where the disability for

which compensation is sought under a Workmen's Compensation Act, is of such character as to require determination of its nature, cause, and extent to be made by professional persons, proof thereof must be made by testimony of such witnesses. *Pacific Employers Ins. Co. v. Industrial Accident Commission,* 118 P.(2d) 334 (Cal. 1941); *Cutler v. Bergen, etc. Co.,* 25 Atl.(2d) 75 (Pa. 1942); *Burton v. Holden, etc. Lbr. Co.,* 20 Atl.(2d) 99 (Vt. 1941).

The rule as to the necessity of medical testimony in such cases is well stated in 32 C.J.S. Sec. 569d, page 399, as follows:

> "As a general rule the weight to be given the opinion of a medical or other expert witness as to the cause or effect of a happening, condition, situation, or circumstance is for the jury or other trier of the facts, and the opinion is not conclusive, *but when the subject under consideration is one within the knowledge of experts only, and there is no reason for the exercise of common knowledge, undisputed expert testimony which is based on scientific processes, methods, or knowledge is to be accepted as conclusive by the trier of the facts,* provided the credibility of the witness or witnesses is accepted. An expert opinion as to cause or effect may constitute substantial evidence, sufficient to support a finding in accordance with the opinion. Expert evidence as to causal connection is not necessary where facts are testified to by lay witnesses with sufficient clearness that laymen in ordinary affairs of life can infer cause from effect, *but, where an injury is of such a character as to require skilled and professional men to determine the cause thereof, the question is one of science,*

> *which must be proved by the testimony of skilled and professional men.*" (Our italics)

There certainly can be no question here but that the cause of claimant's alleged disability involves a determination of physical processes which are "obscure and abstruse" concerning which a layman can have no well-founded knowledge, and can do no more than indulge in mere speculation.

Surely, all of the attendant facts are not sufficient to indicate to the *lay mind* that the only fair inference to be drawn was that the alleged accident in May or June 1942, proximately contributed to the disability beginning after December 18, 1942. The medical evidence certainly does not support the findings of the Deputy Commissioner, and the other evidence invites only a trip into the realm of speculation and conjecture as to the pathological cause of the disability complained of.

As said by the court in *National Labor Relations Board v. Thompson Products Inc.*, 97 F.(2d) 13 (6th Cir.) at page 15:

> "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power."

If the Deputy Commissioner is permitted to ignore the opinions of medical experts in situations such as presented in the case at bar, that "dividing line" vanishes into the thin air, for the employer and insurance carrier have no other way to protect themselves from claims based on chronic ailments to which most men in adult life are heir.

## CONCLUSION

It is respectfully submitted that the findings of the Deputy Commissioner are based purely on conjecture and speculation, wholly unsupported by medical proof, and are therefore "not in accordance with law." The compensation order of the Deputy Commissioner should therefore be annulled, and the judgment of the District Court should be reversed.

Respectfully submitted,

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